the defendant's veracity has been called in question, I feel I ought to state my own views on his version of the accident which I have no hesitation in accepting as a true version of what really occurred.

As counsel who took over the conduct of the plaintiff's case at the continued cross-examination of the defendant on 30th May, after the case had been part-heard previously on 10th May this year, has himself stated in other motor accident cases in which he has appeared before me, it is difficult for witnesses to be mathematically precise some time after the event about matters such as times, distances and speeds. It is small wonder, therefore, that the defendant who was driving the taxi, in which the plaintiff was a passenger, just after midnight on the morning of 5th January, 1967, on a left-hand bend in Upper Thomson Road at about the 5¾ milestone towards the city, was unable to be as mathematically precise about these matters as he was expected and required to be on this particular occasion.

Despite any apparent lack of precision on his part, I am satisfied, on the evidence as a whole, that he was telling the truth to the best of his ability as to why his taxi went off the road on to the grass verge and then landed upside down in a drain to his left.

I am also satisfied that there was an oncoming car which he suddenly saw approaching him at speed on his own half of the road after he had completed the left-hand bend. This left him with no alternative except to try to minimise the impending disaster as best he could. I do not accept the suggestion that he should have been crawling round the bend as he reached it at a very low speed in order to avoid possible speed maniacs who might have been bent on entering the bend from the opposite direction by slicing it. He had driven on this particular route for a long time without mishap and even the plaintiff stated that on this particular night he had driven quite well from the 13th milestone until the accident.

I am satisfied that the avoiding action taken by him was one which any reasonable user of the road, like himself, confronted with the same situation, *i.e.* a head-on collision through no fault of his own, could well have adopted on emerging out of this particular bend short of having to commit virtual suicide. In other words, I accept his explanation.

The plaintiff's claim cannot succeed from any point of view and is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Murphy & Dunbar; Rodyk & Davidson.*

MOHAMED AMIRDIN v. VARATHARAJAN

[A.C.J. (Yong J.) July 1, 1968]
[K.L. — Civil Appeal No. 20 of 1967]

Practice and Procedure — Appeal — Finding of fact — Credibility of witnesses — When appellate court will upset such finding.

Bills of Exchange — Dishonoured cheque — No notice of dishonour — Waiver of notice — Bills of Exchange Ordinance, 1949, s. 50(2).

At the trial, the respondent claimed that he had given a friendly loan of $1,000 to the appellant without charging interest and had accepted from him as security a cheque for $1,000 which was dishonoured when it was presented to the bank for payment. The appellant denied borrowing any money from the respondent but admitted signing the said cheque which he alleged he had given to his clerk. It was also alleged by the appellant that the respondent had lent the said $1,000 to the said clerk with interest and that the Moneylenders Ordinance 1951 was thereby contravened. The appellant further claimed that no due notice of dishonour of the cheque was given to him. After considering the evidence and the credibility of witnesses, the learned magistrate found as a fact that the respondent had made a loan of $1,000 without interest to the appellant. He held that the Moneylenders Ordinance, 1951, did not apply and that no notice of dishonour of the cheque need be given to the appellant.

Held, dismissing the appeal: (1) the court, not being satisfied that the trial magistrate was plainly wrong in coming to the conclusions as he did will not upset his finding of fact based on his opinion of the credibility of witnesses whom he had seen and heard;

(2) by reason of section 50(2) of the Bills of Exchange Ordinance, 1949, the drawer of a cheque is not entitled to notice of dishonour if such notice is waived, express or implied. The appellant, by not having sufficient effects in his bankers' hands and having made no arrangement with them for an overdraft to meet the amount drawn on the cheque, had dispensed with the notice by waiver.

Cases referred to:—

(1) *Clarke* v. *Edinburgh & District Tramways Co. Ltd.* 1919 S.C. (H.L.) 35.

(2) *Powell & Wife* v. *Streatham Manor Nursing Home* [1935] A.C. 243.

(3) *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.* [1964] M.L.J. 87.

(4) *Tan Tek Yan* v. *Samuel* [1964] M.L.J. 283.

(5) *Lombard Banking Ltd.* v. *Central Garage* [1962] 2 All E.R. 949.

(6) *Cordery* v. *Colville* (1863), 32 L.J.C.P. 210.

CIVIL APPEAL.

Hussain Hassan for the appellant.

V. K. Palasuntharam for the respondent.

Cur. Adv. Vult.

Yong J.: The respondent (who was plaintiff in the suit) claimed that he had given a friendly loan of $1,000 to the appellant without charging interest and had accepted from him as security a cheque for $1,000, which when presented to the bank for payment was dishonoured.

The appellant denied borrowing any money from the respondent, but admitted executing the

said cheque which he alleged he had given to his clerk S. V. Chidambaram.

He further alleged that the said sum of $1,000 was lent by the respondent to the said clerk with interest, and contended that such loan had contravened the provisions of the Moneylenders Ordinance 1951, and that no due notice of dishonour of the said cheque was given to the appellant.

The learned magistrate after reviewing all the evidence and the credibility of the various witnesses found as a fact that the respondent did lend to the appellant the said sum of $1,000 without interest and held that the Moneylenders Ordinance did not apply. He gave judgment for the respondent and the appellant appealed.

After hearing arguments I dismissed the appeal and indicated that I would give my reasons later, and I now proceed to do.

Grounds 1 to 6 of the appeal seek to upset the learned magistrate's findings of fact.

What is the principle which an appellate court should follow in reviewing the findings of a trial magistrate?

Lord Shaw in the House of Lords case of *Clarke* v. *Edinburgh & District Tramways Co. Ltd.*[1] said:—

"In my opinion the duty of an appellate court in those circumstances is for each judge of it to put to himself as I now do in this case, the question. Am I, who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case, in a position, not having those privileges to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment".

In another House of Lords case of *Powell and wife* v. *Streatham Manor Nursing Home,*[2] Lord Wright stated:—

"Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong. And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing".

In the Privy Council case of *Tay Kheng Hong* v. *Heap Moh Steamship Co. Ltd.,*[3] Lord Guest in reversing the judgment of the Singapore Court of Appeal and restoring the decision of the trial judge observed that:—

"Before the Court of Appeal in Singapore was entitled to reject the trial judge's estimate of the credibility of the appellant and Goh Leh, they would have to be satisfied that the trial judge's view was plainly wrong and that any advantage he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion".

This principle was followed by the Court of Appeal in *Tan Tek Yan* v. *Samuel* [4] where Wee Chong Jin C.J. said:—

"It has been laid down on numerous occasions that an appellate court even though it is disposed to come to a different conclusion on the printed evidence will not upset the finding of a trial judge on a question of fact which turned solely on the credibility of witnesses, unless it is satisfied that the trial judge was plainly wrong".

I respectfully adopt and apply the aforesaid principles to our present case and as I am not satisfied that the trial magistrate was plainly wrong in coming to the conclusions as he did on the evidence before him, all the six grounds of appeal must therefore fail.

The question raised by the appellant's 7th and last ground of appeal was whether the learned magistrate was right when he held that no notice of dishonour of the said cheque need be given to the appellant.

The relevant parts of section 50(2) of the Bills of Exchange Ordinance 1949 (omitting the words not material to this appeal) read as follows:—

"(2) Notice of dishonour is dispensed with —

(b) by waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice;

(c) as regards the drawer in the following cases, namely —

(iv) where the drawee . . . . is as between himself and the drawer under no obligation to . . . . pay the bill;

(v) where the drawer has countermanded payment".

The authorities show that the courts have often been ready to infer waiver from very slight evidence. (See *Lombard Banking Ltd.* v. *Central Garage.*[5])

The drawer of a cheque is entitled to notice of dishonour unless such notice is excused or or waived. Such notice may be excused or waived when the dishonour is due to absence of effects in his banker's hands or when payment has been countermanded by him. (See *Byles* on Bills of Exchange, 22nd Edition page 262).

The illustration on page 168 of *Chalmer's* Bills of Exchange, 13th Edition reads:—

"*A* having the balance of £10 at his bankers, and having no authority to overdraw, draws a cheque for £50. (which was dishonoured). *A* is not entitled to notice".

In *Cordery* v. *Colville* [6] it was held that:—

"a promise to pay a bill before the time for giving notice has expired may also be used as evidence that notice has been dispensed with, and a promise to pay made after the time for giving notice has expired is evidence that notice has been waived".

At page 211 Byles J. said:—

"The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour."

In the instant case the learned magistrate on the evidence before him found that the appellant had on several occasions asked the respondent to give him more time to pay and not to present the cheque to the bank for payment, and that when it was finally presented for payment was dishonoured with the words "Refer to drawer" which clearly indicated that the appellant had insufficient effects in his bankers' hands and had made no arrangement with them for the overdraft to meet the amount drawn on the said cheque. The appellant's last and final ground of appeal must therefore also fail. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Hussain Hassan & Co.; V. K. Palasuntharam.*

UNITED OVERSEAS BANK LTD. v. CHUNG KHIAW BANK LTD.

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Chua J.) July 10, 1968]

[Singapore — Federal Court Civil Appeal No. Y8 of 1968]

Practice and Procedure — Order made on originating summons where no appearance was made — Application to set aside order — Locus Standi of applicants — Whether order is ex parte order within O. LIII r. 4(1) of R.S.C.

Practice and Procedure — Order made on originating summons — Summons not served on necessary party — Whether a nullity or irregularity — Whether party not served entitled ex debito justitiae to set aside order — Whether they are persons affected by the order — Inherent jurisdiction of court to set aside order.

Registration of Deeds — Applicant attaching interest in immovable property and registering same in Registry of Deeds — Respondent obtaining an order declaring them as mortgagees — Non-registration of order by respondent — Priority — Registration of Deeds Ordinance, (Cap. 255), s. 7(3).

This was an appeal from the decision of Winslow J. ([1968] 1 M.L.J. 291) dismissing an application by the appellants by way of summons-in-chambers to set aside an order made in an originating summons.

The facts leading to this appeal were as follows:— On October 27, 1966, the appellants obtained an order attaching the interest of one Tay Soo Tong in certain immovable properties (hereinafter referred to as 'the said property'), to satisfy a judgment by them against him. This order was registered against the said properties the next day.

On November 14, 1966, the respondents, by way of an originating summons (which was served on Tay Soo Tong by substituted service to which he did not enter an appearance) obtained an order, *inter alia*, declaring them to be the legal mortgagees of the said properties and giving them liberty to sell the said properties. At the hearing of this originating summons no mention was made of the order obtained by the appellants.

The appellants then took out a summons-in-chambers *inter alia* to set aside the order of court obtained by the respondents under O. XXVIII r. 15 and O. LIII r. 4(1) of the Rules of the Supreme Court. The respondents objected to the application, *inter alia*, on the ground that the appellants, not being parties to the originating summons, had no *locus standi* and therefore had to obtain leave of the court before they could intervene in the matter. Winslow J. dismissed the application on the ground that an order made in an originating summons to which a defendant was required to enter an appearance but failed to do was an order under in default of appearance which could not governed by O. XIII r. 14 and could not be regarded as an *ex parte* order under O. LIII r. 4(1). The judge was further of the view that United Overseas Bank, Ltd. were "not persons affected by the order of court of November 14, 1966, in the sense that they were necessary parties to it because they suffered no injury directly under it."

Held, allowing the appeal: (1) a judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing. An application so heard in the absence of a party is not an *ex parte* application. It is the hearing which is *ex parte* and an order made on such hearing is an *ex parte* order within the terms of O. LIII r. 4(1);

(2) as the respondents had not registered the memorandum of charge before the registration of the order of attachment by the appellants, the latter had, by reason of section 7(3) of the Registration of Deeds Ordinance, obtained priority over them. Therefore the appellants were an essential party to the originating summons and were clearly persons affected by the order made *ex parte* within the meaning of O. LIII r. 4(1);

(3) the order made on the originating summons was a nullity and the appellants who are affected by it were entitled *ex debito justitiae* to have it set aside. *Craig* v. *Kanseen* [3] followed.

Cases referred to:—

(1) *Jacques* v. *Harrison* (1884), L R. 12 Q.B.D. 165.

(2) *Fung Sin Wa & Ors.* v. *Moi Chan Hen* (1897), 4 S.S.L.R. 175.

(3) *Craig* v. *Kanseen* [1943] 1 All E.R. 108.

FEDERAL COURT.

G. Starforth Hill (*K. S. Chung* with him) for the appellants.

David T. See (*Francis Teoh Ong Cheh* with him) for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the court): The circumstances which give rise to this appeal are as follows:—

The appellants, United Overseas Bank, Ltd., sued Tay Soo Tong in Suit No. 2189 of 1965 and obtained a judgment for $378,267.31 on the 16th June, 1966.

On the 22nd September, 1966, the respondents in this appeal, Chung Khiaw Bank, Ltd., took out an Originating Summons No. 239 of 1966 against the same Tay Soo Tong and an order for substituted service was obtained against him and the originating summons was not heard until the 14th November, 1966.

In the meanwhile United Overseas Bank, Ltd. took out a writ of seizure and sale and an order was obtained on the 27th October, 1966, attaching the interest of Tay Soo Tong in certain immovable properties (hereinafter referred to as "the said properties") and on the 28th October,